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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1615

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

ROBERT HALL CLOTHES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
1. The Undisputed Facts	3
2. The Proceedings and Opinions Below	7
REASONS FOR DENYING THE PETITION	10
1. The Opinion of the Court of Appeals is Manifestly Correct	10
2. The Facts in this Case are Unique and the Opinions Below Will Not Have Broad Application	17
3. Whether a Party Sustains Its Burden of Proof is Not a Matter Warranting Review	19
CONCLUSION	20

CITATIONS

Cases:

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607	12
Griggs v. *Duke Power Co.*, 401 U.S. 424	16
Market Co. v. *Hoffman*, 101 U.S. 112	12
Petition of Public National Bank of New York, 278 U.S. 101	12

PAGE

Shultz v. *First Victoria National Bank*, 420 F.2d 648 (C.A. 5) 13

Shultz v. *Saxonburg Ceramics, Inc.*, 314 F.Supp. 1139 (W.D. Pa.) 15

Shultz v. *Wheaton Glass Co.*, 421 F.2d 259 (C.A. 3), cert. denied, 398 U.S. 905 15

Wirtz v. *Dennison Mfg. Co.*, 265 F. Supp. 787 (D. Mass.) 15

Statutes:

Fair Labor Standards Act, as amended, 77 Stat. 56, 29 U.S.C. 201 *et seq.*:

Section 6(d)(1), 77 Stat. 56, 29 U.S.C. 206(d)(1) 2, 7, 8, 10, 11, 18

Title VII of The Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 16

Miscellaneous:

109 Cong. Rec. 9203 13

109 Cong. Rec. 9206 14

29 C.F.R. 800.116(e) 14

29 C.F.R. 800.140 14

Annot. 7 ALR Fed. 707 18

Field Office Handbook, Department of Labor, Wage and Hour and Public Contracts Division 14

H. Rept. 309, 88th Cong. 1st Sess. U.S. Code Cong. and Adm. News 687 (1963) 13

Rule 19, Rules of the United States Supreme Court 19

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The decision of the Third Circuit Court of Appeals (Pet. 19-39) is reported at 473 F.2d 589. The decision of the United States District Court for the District of Delaware (Pet. 42-72) is reported at 326 F. Supp. 1264.

JURISIDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether with respect to a clothing store, as to which the Courts below held that respondents justifiably assigned only female salespersons to the Ladies' Department and only male salespersons to the Men's Department, there was error in their unanimous holdings that lower wages paid to female salespersons were lawful under Section 206 (d) (1) (iv) of the Fair Labor Standards Act as "based on any other factor other than sex" where respondents proved that the disparate pay scales were based on the greater profits per hour and greater sales per hour produced in the Men's Department due to the difference in the economic characteristics of the merchandise sold in that Department compared with that sold in the Ladies' Department, and were not based on the sex of the salespersons.

2. Whether the court of appeals erred in (a) unanimously affirming the district court's conclusion that respondents sustained their burden of proof as to their full-time salespersons, and (b) reversing by a divided vote the district court's determination that respondents did not carry their burden of proof as to their part-time salespersons.

STATUTE INVOLVED

Section 6 (d) (1) of the Fair Standards Act of 1938, as amended, 29 U.S.C. 206 (d) (1), was added to the law as part of the Equal Pay Act of 1963, Pub Law 88-38, 77 Stat. 56. It provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employ-

ed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

STATEMENT

1. The Undisputed Facts

Respondents operate a retail clothing store located on Greenbank Road in Wilmington, Delaware (the "Greenbank Store"), which sells primarily fitted apparel. The Greenbank Store is divided into two departments, one in which only men's and boys' clothing is sold (the "Men's Department"), and the other in which only women's and girls' clothing is sold (the "Ladies' Department") (A 43-44, Pet. 44-45).[1] From the opening of this store in 1962, respondents have followed a policy of having only men sell the clothing offered in the Men's Department and only women sell the clothing offered in the Ladies' Department (A 296, 296c). There is no interchange of selling personnel between the two departments (A 45).

1. All references preceded by the letter "A" are to the joint appendix filed in the court of appeals, a copy of which was filed with the clerk of this Court by petitioner.

Respondents' policy (which is not under challenge) was adopted because of the frequent necessity in connection with the sale of clothing for close bodily contact between the salesperson and the customer (Pet. 47). An overwhelming percentage of apparel sold in both departments consist of items of clothing requiring bodily fit, i.e., suits, dresses, coats, slacks, skirts, etc.; only an insignificant number are items of haberdashery and accessories (A 454-55). Hence, the salesperson is required to assist with open zippers; to touch the body of a customer near private parts in connection with the measurement of the crotch, seat, waist, chest or inseam; and to touch other areas of the body while assisting in try-ons (A 296, 296a, 296c, Pet. 47). Both salesmen and saleswomen also have occasion in the course of selling clothing to observe their customers in various stages of undress in connection with try-ons (A 296, 296a, 296c, Pet. 47). Therefore, it would embarrass both and inhibit sales unless the salesperson and customer were of the same sex (Pet. 47).

The merchandise sold in the Men's and Ladies' Departments bear sharply different economic characteristics. The clothing in the Men's Department, on the average, bears considerably higher markups and lower markdowns than that in the Ladies' Department (A 440-44, 480-82, Pet. 56-57). Substantially more of higher priced clothing is carried in the Men's Department than in the Ladies' Department (A 242, 478-79, 483-86, Pet. 53-54). The average unit selling price of apparel is substantially higher in the Men's Department than in the Ladies' Department (A 483-86, Pet. 54). Because of these differences in the economic characteristics of the merchandise sold in the Men's and Ladies' Departments, both the dollar volume of sales and the percentage of gross profits to sales have con-

sistently been significantly higher in the Men's Department than in the Ladies' Department (A 451). Moreover, the salesmen have consistently produced more gross profits per hour of work and sold more merchandise per hour of work in terms of dollars than their female counterparts (A 487).[2]

Full-time sales personnel in both departments[3] are compensated by a weekly salary plus incentives; part-time sales

2. The following table from the opinions of the district court and the court of appeals (Pet. 21, 65) is particularly instructive:

SCHEDULE OF HOURLY SALES, EARNINGS AND GROSS PROFIT

Year	Sales Per Hour	Excess M over F	Per Hour Earnings	Excess M over F	Gross Profit Per Hour	Excess M over F
Men's & Boys'						
1963	*38.31	40%	*2.18	25%	*15.52	72%
1964	40.22	32%	2.46	32%	16.55	74%
1965	54.77	64%	2.67	48%	23.85	114%
1966	59.58	73%	2.92	50%	26.66	134%
1967	63.14	71%	2.88	45%	28.74	133%
1968	62.27	70%	2.97	47%	29.21	127%
1969	73.00	77%	3.13	45%	34.16	127%
Ladies' & Girls'						
1963	*27.31		*1.75		*9.00	
1964	30.36		1.86		9.49	
1965	33.30		1.80		11.14	
1966	34.31		1.95		11.43	
1967	36.92		1.98		12.36	
1968	37.20		2.02		12.91	
1969	41.26		2.16		15.03	

* These represent dollar figures.

3. From shortly after its opening in 1962, there have been only two full-time salespersons at the Greenbank store, one each in the Men's and Ladies' Departments (Pet. 50-51).

personnel[4] are compensated by an hourly wage plus incentives.[5] Since 1962 the male sales employees at the Greenbank store have received higher regular compensation than female sales employees (A407-11, Pet. 51-52). Unlike the unique situation involving sales personnel, all non-sales employees at Greenbank, such as cashiers, wrappers, tailors and porters, whether they be male or female, have at all times been compensated at the same salary or wage rate, i.e., all cashiers are compensated equally, all tailors equally, all wrappers equally and all porters equally (A 368).

4. The number of part-time sales personnel has varied from two to five for each department (Pet. 50-51).

5. The incentive compensation system is designed to move merchandise and increase profits. Different items of merchandise carry different amounts of incentive compensation (Pet. 52-54). The incentives are based upon various factors, such as type of garment, number of garments sold to a given customer at one time, price, inventory age of garment, and the like. The particular amount of incentive compensation placed upon an item of merchandise, regardless in which department sold, is determined not by whom the item is sold, but on the need to sell the particular item, the markup on the item, the profitability to the store on the sale of the item, the length of time the item is in the store, the ease of selling the item and its selling price (A 236-38, Pet. 53). In both the Men's and Ladies' Departments, the higher the price of the merchandise the greater the incentive compensation (Pet. 53). Merchandise in the Men's Department remains in the store longer before it is sold than merchandise in the Ladies' Department. The longer merchandise remains in the store the higher the incentive when it is sold. Using these criteria, the salesmen at Greenbank regularly earn more in incentive compensation than the saleswomen (Pet. 54). The district court found that the differences in incentive compensation depend not on the sex of the salesperson but on the differences in economic characteristics of the particular items of merchandise being sold and held that the incentive system was lawful both as to full-time and part-time salespersons (Pet. 69-70).

2. The Proceedings and Opinions Below

The Secretary of Labor instituted this action in 1966 in the United States District Court for the District of Delaware to enjoin respondents' alleged violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), with respect to the wages (starting, progressive and incentive) paid to the female sales employees at the Greenbank store, and to restrain the withholding of any wages found due as a result of the alleged vioation (A 8-22). At trial respondents principally urged that (a) the work performed by the salesmen required greater skill, effort and responsibility than that performed by the saleswomen, and (b) the different economic characteristics of men's and women's apparel resulting in greater benefits to respondents from the sales by the salespersons in the Men's Department than from the sales by the salespersons in the Ladies' Department constituted a factor other than sex which justified the disparate wages.

The district court (Steel, J.), although specifically recognizing that the job of salesperson in the Men's Department could not reasonably be performed by women and that the job of salesperson in the Ladies' Department could not reasonably be performed by men (Pet. 47),[6] held that the Equal Pay Act was applicable (Pet. 47-50), and that the Secretary had made out a prima facie case against respond-

6. The district judge held that:

"The jobs performed by salesmen and salesladies, respectively, are not reasonably susceptible of performance by both sexes because of the nature of the jobs. One is a 'male' job and the other a 'female' job" (Pet. 47).

"Here the necessity of close bodily contact between customers and sales personnel made it logical and necessary for salesmen to be employed in the men's department and salesladies in the women's department" (Pet. 70).

ents for violating the statute (Pet. 61). The district court held that the jobs of the sales personnel in the Men's and Ladies' Departments were equal, requiring substantially equal skill, effort and responsibility (Pet. 55-61).

Turning then to respondents' affirmative defense that the wage differentials in favor of the salesmen were authorized by Section 206(d)(1)(iv) of the Act because based on a factor other than sex, namely, greater sales and profits to respondents attributable to the different economic characteristics of the merchandise being sold in the Men's Department, the district court held that such "economic considerations" came within the statutory exception and that as to the full-time employees at the Greenbank store respondents had met their burden of proving that "the pay differential in favor of salesmen as against saleswomen . . . was based upon economic considerations and in no way upon sex" (Pet. 66, 67, 69. See also Pet. 24). The district court also upheld the validity of the disparities in incentive compensation paid to all sales employees in both the Men's and Ladies' Departments. As to part-time employees, the district court concluded that respondents had not met their burden of proving that the disparity in wages was attributable to "economic benefits" (Pet. 68). The court therefore granted the Secretary's prayer for relief as to the basic wages of the part-time employees, but declined to award such employees interest on the withheld wages which it ordered respondents to pay (Pet. 70-72).[7]

Neither party being satisfied with the result in the district court, both appealed to the United States Court of Appeals for the Third Circuit (A 556-558). Respondents challenged that part of the district court's decision which concluded that they discriminated in the payment of wages

7. Respondents motion for reargument was thereafter denied by the court (Pet. 73-74).

to part-time saleswomen at the Greenbank store. The Secretary appealed the district court's determination that respondents did not violate the statute by the payment of higher wages to the full-time salesmen, as well as its refusal to award interest on the back wages ordered to be paid the part-time employees. However, the Secretary did not appeal from the district court's determination that the differential in incentive compensation in favor of both full-time and part-time salesmen did not violate the Act.

The court of appeals unanimously affirmed the district court's determination in favor of respondents on the wages paid full-time salespersons; it reversed by a divided vote the district court's conclusion that the wage differential in favor of part-time salesmen violated the Act. In so doing, the court unanimously held that "the district court was correct to hold in this case that economic benefits to an employer can justify a wage differential" (Pet. 27).[8]

The majority reversed the lower court's decision as to part-time salespersons because the Equal Pay Act does not require "the employer to justify his base salary by correlating it to individual performance" (Pet. 34). The majority concluded that

> "The overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the differences in base salary. These statistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. Robert Hall's executives testified that it was their practice to base their wage rates on these departmental figures.

8. Judge Van Dusen's partial dissent specifically indicates his agreement on this point. See Pet. 36 n.1.

> While no business reason could justify a practice clearly prohibited by the act, the legislative history . . . indicates a Congressional intent to allow reasonable business judgments to stand. It would be too great an economic and accounting hardship to impose upon Robert Hall the requirement that it correlate the wages of each individual with his or her performance. This could force it toward a system based totally upon commissions, and it seems unwise to read such a result into § 206 (d) (iv)" (Pet. 34-35).

On this point alone Judge Van Dusen dissented, stating only that he concluded that the district court's "findings of fact" as to part-time employees were "not clearly erroneous"(Pet. 36).

REASONS FOR DENYING THE PETITION

1. The Opinion Of The Court Of Appeals Is Manifestly Correct.

The unanimous conclusion of the four judges below that under the Equal Pay Act "economic benefits to an employer can justify a wage differential" between jobs which require substantially equal skill, effort and responsibility (Pet. 27) is fully supported by the statutory language, its legislative history, the Department of Labor's own published interpretations of the Act and the decided cases.

A. We begin, as did the court of appeals (Pet. 27-28), with the language of the statute itself. In plain and unambiguous terms, § 206 (d) (1) authorizes the payment of disparate wages for jobs requiring equal skill, effort and responsibility performed under similar working conditions when based upon "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based*

on any other factor other than sex." (Emphasis added.) On its face, therefore, § 206 (d) (1) (iv) authorizes the payment of disparate wages if based on *any* factor other than sex.

In an attempt to read the word "any" out of the statute, petitioner argues, in effect, that Congress cannot possibly have intended such a result, but really meant to authorize disparate wages for equal work only in those cases in which the factor relied upon is job related, i.e., is a function of the individual worker's qualifications for, or skill, effort and responsibility in the performance of, his or her job (Pet. 13-14).[9] The statutory language, however, has no such limitation and authorizes differentials in wages resulting from any factor other than sex whether or not related to an individual's performance on the job. In the case of selling activities, the dollar sales per selling hour, and, more significantly, the profits per selling hour, are the economic factors which must necessarily have a major impact on wages paid; thus, where significant differences in these factors are present, differentials in wages may result which the statute by its terms specifically approves.

A requirement that a "factor other than sex" be related to job performance would strain beyond reason the plain language of the Act and would eliminate entirely any significance of those words. The Act specifically authorizes

9. The Secretary's position as to the governing test has changed with each brief filed on his behalf. In the main brief submitted to the court of appeals, the standard suggested was "a factor . . . related to job performance." In the reply brief to the court below, the Secretary's position shifted and the proper test was said to be a factor related to job performance *or* "typically used in setting wage scales" (Pet. 26). In the petition filed with this Court, the Secretary now argues that the test is a factor which reflects "in some measure the individual job performance, or qualifications for the job, of each employee" (Pet. 13-14).

pay differentials in spite of "equal" job performance. Thus, a pay differential based upon a seniority system is not a violation of the Act, though unrelated entirely to job performance. Moreover, by expressly authorizing pay differentials based upon "a merit system" or "a system which measures earnings by quantity or quality of production", Congress thereby exempted from the Act all differentials based upon factors related to job performance. Therefore, the final exception, i.e., "a differential based upon any other factor other than sex," means exactly what it says, to wit: "any other factor other than sex." It is not restricted to factors related to job performance and the Act cannot be rewritten by the Secretary to engraft such a restriction upon it. For the courts below to have held otherwise would have violated two cardinal principles of statutory construction: (a) The words of a statute must be construed in their ordinary sense unless a contrary intention is apparent, *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-18; and (b) "[S]ignificance and effect shall, if possible, be accorded every word". *Market Co.* v. *Hoffman*, 101 U.S. 112, 115; *Petition of Public National Bank of New York*, 278 U.S. 101, 104.

B. As the court of appeals unanimously concluded, the legislative history of the Equal Pay Act also makes it clear that Congress did not intend to deny an employer the right to compensate differently employees of opposite sexes who perform equal work, provided the employer's compensation policy was based upon legitimate business reasons and not upon sex (Pet. 30-32). The House Committee report explains that the statute contains three "specific exceptions and one broad general exception" which it included because "it is impossible to list each and every exception"

(H. Rept. 309, 88th Cong., 1st Sess., quoted by the court below at Pet. 31). See *Shultz* v. *First Victoria National Bank,* 420 F.2d 648, 656-57 (C.A.5). Representative Griffin explained Section 206(d)(1)(iv) to the House as follows:

> "I should like to focus the attention of the gentleman upon small roman numeral iv, at the top of page 3 which makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found. Roman numeral iv is a broad principle, and those preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production. The other body saw fit to leave out references in the bill to a merit system, a system which measures on the basis of quality and quantity, and a seniority system, and included only the broad language found in roman numeral iv of our bill. However, it should be clear that under either bill differential based upon any factor other than sex is not a violation." 109 Cong. Rec. 9203.[10]

Further the legislative history indicates as Representative Goodell, a key sponsor of the Act, stated:

> "I think this point should be clarified. The gentleman has made a good point that there are many fac-

10. It deserves comment that petitioner extracts only four words from the above quoted statement of Representative Griffin, and by using these words out of context tries to imply that exception iv of the Equal Pay Act has a limited application (Pet. 13). The full statement of the Congressman quoted above indicates the Secretary's distortion thereof and that exception iv was intended by Congress to have the broadest application.

> tors that can be taken into consideration in working out differentials of pay among employees, that the gentleman has mentioned, which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men. If any employer wants to set up a system where he pays a job differential relating to absenteeism, regardless of sex, he can do that. If he wants to set up a system of differentials in pay relating to insurance costs of all employees, regardless of sex, he can do that. There are a good many other examples that could be given—all valid under this bill as written, provided the employer does not base his differentials on sex." 109 Cong. Rec. 9206.

There is no reference in the entire legislative history to the limitation of job-relatedness which the petitioner seeks to engraft on the statutory language.[11]

C. The regulations and guidelines issued by the Department of Labor itself similarly recognize the basic principle that economic factors constitute a basis for discrimination in wages between the sexes. Section 800.116(e) of the Wage-Hour Administrator's Interpretative Bulletin, 29 C.F.R. § 800.116(e), and Section 34d07 of the Field Office Handbook issued by The Wage and Hour and Public Contracts Division of the Department of Labor both specifically validate the payment of different rates of commission for merchandise sold in different departments within one establishment where the merchandise sold in the two depart-

11. The Wage-Hour Administrator's Interpretive Bulletin explains the statutory exceptions in language reminiscent of the House Report and speaks of "three specific exceptions and one broad general exception" 29 C.F.R. § 800.140. The qualification advanced in the Secretary's petition that the general exception only pertains to job related factors also does not appear therein, or indeed anywhere in the regulations.

ments differs in style, quality, price, markup, sales volume, turnover and ease of selling, although the salesmanship required of the individual worker in the two departments constitutes equal work.[12] As the court of appeals observed, this makes "good business sense" and should apply even if the method of compensation is "base salary rather than a commission" (Pet. 29).[13]

D. The decided cases which have considered the same issue raised herein all have recognized that a difference in economic benefits to an employer justifies a difference in wages without reference to individual job performance. *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 267 (C.A. 3), cert. denied, 398 U.S. 905; *Wirtz* v. *Dennison Mfg. Co.*, 265 F. Supp. 787, 790 (D. Mass.); *Shultz* v. *Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139, 1145-46 (W.D. Pa).[14] See also Pet. 31-32. No decision holds to the contrary; not even the opinion of the dissenting judge in the court below.

12. The two provisions appear in the joint appendix at A 488, in the Petition 69, and are quoted in full in footnote 9 of the opinion of the court of appeals (Pet. 28-9).

13. It would seem that by his failure to appeal the district court's adverse determination as to respondents' incentive compensation system, petitioner concedes as much at least as regards the incentive compensation paid to all salespeople at the Greenbank store. The ruling on incentive compensation is as basic as the holding on principal compensation. The district court found that the differences in incentive compensation depend not on the sex of the selesperson but on the differences in economic characteristics of the items of merchandise being sold (Pet. 69-70). The amount of incentives paid to salespersons depend on price, quality, markup, markdown and style of merchandise. The salesmen receive higher incentive compensation because the merchandise in the Men's Department has higher markups, lesser markdowns and is in the higher price range than the merchandise in the Ladies' Department. Just as in principal compensation, it is the economic characteristics of the merchandise alone which determines the incentive compensation in both departments (A 236-240).

14. While the employer did not prevail in all of these cases, the reason lies in a failure of proof—the employer's failure to prove that it received the claimed economic benefits—not in the absence of a defense cognizable under the Equal Pay Act.

While this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* did limit the use of employment and promotion criteria, neutral on their face but which had the effect of excluding blacks from employment opportunities, to only those which can be shown to be related to job performance, that decision in a different statutory framework has no impact on this case. First, the *Griggs* holding relates to a situation wherein the evidence failed to justify the exclusion of blacks from traditionally white jobs, while in our case both of the courts below concluded that females, for reasons of business necessity, could not perform the selling jobs in the Men's Department. Clearly any employer who arbitrarily excludes female employees from jobs performed by males would violate the Equal Pay Act. But such is not this case. The courts below held, and it was neither challenged by the Secretary below nor is it challenged in his petition, that there were legitimate business purposes which prevented saleswomen from selling men's clothing (p. 7, n. 6, *supra*). See also Pet. 32. Second, in *Griggs* the pertinent administrative regulations of the EEOC and the legislative history of the statute supported the result reached, 401 U.S. at 433-36; here they run counter to the petitioner's argument. Finally, *Griggs* is inapposite because it "did not deal with justification of a wage differential, and this is the issue we are considering" (Pet. 32).

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With the language of the statute, its legislative history, the Labor Department's regulations and the decided cases all being adverse to petitioner's position, this case does not merit further review by this Court.

2. The Facts In This Case Are Unique And The Opinions Below Will Not Have Broad Application.

While the petitioner would have the Court believe that the decision below is one of enormous impact which threatens the effective enforcement of the Equal Pay Act (Pet. 11-12, 14), such is hardly the case. Petitioner cavalierly brands the decision below as one which will affect the entire retail-sales industry and asserts that it bears upon forty-three pending cases, but such rhetoric can only impress one who ignores the facts of this case.

The salient factors in the record which warranted the result reached herein are: First, respondents sell fitted apparel. Second, the sales force is justifiably segregated by sex so that women sell only to females and men to males. Third, the line of merchandise offered for sale by the male sales force is of higher price, bears higher markups and lesser markdowns, is of better quality and generates higher profits than the merchandise offered for sale by the female sales force. Within this factual context the court below held that "in this case" the economic benefits realized by the employer from the sale of the merchandise offered for sale in the Men's Department justified the higher wages paid to salesmen (Pet. 27). The decision below therefore only will have an impact on cases against retailers selling fitted apparel of disparate price lines to men and women in separate departments of one establishment.

Two observations with respect to the above point are warranted. The first is that the decisions below turn on the particular economic situation present in this record. The second is that counsel have been unable to find throughout the entire range of commerce another line of products where the sex of the salesperson is determined by the product.

The sale of men's and women's apparel is unique in this respect and hence, when coupled with the record in this case, is uniquely excluded from the scope of the Equal Pay Act.

Once the principle that a defense under exception iv need not be limited solely to individual job performance is disposed of, nothing of general significance remains in this record which warrants review by this Court. The outcome reached herein turns on the particular facts of this case which represent even in retailing a highly unusual combination of circumstances based on the economic characteristics of particular types of merchandise, justifying respondents' differentials in wage compensation.

The enforcement battles under the Equal Pay Act have focused not on the affirmative defenses enumerated in Section 206(d)(1), but on the problem of defining equal work. The overwhelming number of litigated cases in this area have dealt with the issue of whether two jobs require substantially equal skill, effort and responsibility and are performed under similar working conditions. See Annotation 7 ALR Fed. 707. Nothing in the decision below portends a shift in the battle, for there is no way to read the opinions below as promising any easy escape from the strictures of the Equal Pay Act for any and all defendants who rely on the exception found in Section 206(d)(1)(iv).

Thus, the decision below will have no adverse impact on the enforcement of the statute. In contrast, the Secretary's position, if adopted, would have an adverse impact on commerce. Since the cost of sales is a major component of business overhead and has a direct bearing on profits, and since particular lines of merchandise can economically only bear certain reasonable selling costs, an employer faced with the choice of paying base salaries without reference

to the economics of the merchandise being sold or abandoning a salary or wage system in favor of straight commission compensation is very likely to choose the latter course. As the court below observed, the Secretary's position could force respondents "toward a system based totally upon commissions" (Pet. 34). To read the limitation of job-relatedness into the Equal Pay Act would mean that under the Act the sole permissible method of compensation for selling would be commissions, else how could individual performance be measured? This would discard every existing pay arrangement for sales employees who are compensated by wages or salaries and would make illegal all union contracts based on this system, thus outlawing what is surely the most commonly used method of compensation throughout the United States. It is certain that Congress never intended by the Equal Pay Act to effect such a fundamental change in the wage and salary compensation system which is so pervasive throughout the country. Again as the court below observed, "it seems unwise to read such a result into" the Equal Pay Act (Pet. 34-35).

3. Whether A Party Sustains Its Burden Of Proof Is Not A Matter Warranting Review.

The issue as to whether the court of appeals was correct in reversing the district court's determination that respondents failed to meet their burden of proof as to part-time employees hardly comes within the contemplation of Rule 19 of the Rules of this Court as a special and important question warranting review. The court of appeals majority held that the evidence supporting the economic benefit defense was "overwhelming" and justified the differences in compensation (Pet. 34). The pay differentials were based upon the regular departmental accounting figures

which appear *supra* at p. 5 n.2 and were fully justified by that data.

We did not urge below, nor did the court of appeals hold, that any disparity in economic performance will justify a differential in wages. If the economic relationships are not reasonably related to the differences in pay, the employer's economic justification obviously would fail. But the failure would not be due to the absence of the principle, but because of the employer's failure to prove the justification. So long as there is a reasonable relationship between the economics of the situation and the differential in pay, there legitimately is present a "factor other than sex".

CONCLUSION

For all of the foregoing reasons, we submit that the petition for certiorari should be denied.

Respectfully Submitted,

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